

# DUALIST CONSTITUTIONAL THEORY AND THE REPUBLICAN REVOLUTION OF 1800

*John J. Janssen\**

American constitutional development, Bruce Ackerman argues in his recent book, should be understood in terms of three regime-transformative moments: the Constitutional Founding, Reconstruction, and the New Deal.<sup>1</sup> The first moment, Professor Ackerman explains, sheds much light on how to interpret the subsequent moments.<sup>2</sup> Ackerman's book, the first volume of a proposed trilogy on constitutional development, may be, as some reviewers say, one of the most important works on constitutional theory to date.<sup>3</sup> Such praise, however, should be accorded only if the theory comports with historical fact.

This essay begins needed empirical inquiry into Ackerman's theory of constitutional development by assessing it in the context of a particular constitutionally significant historical moment: the rise of the Jeffersonian Republicans in 1800. In his book, Ackerman gives relatively little attention to this moment of constitutional development, which, by conventional historical ac-

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\* Visiting Instructor of Political Science, Southwestern University. Ph.D., expected 1996; J.D., The University of Texas at Austin, 1993; Member, State Bar of Texas; M.A. Yale University, 1989; B.A. Southwestern University, 1987.

1. Bruce Ackerman, *We the People: Foundations* (Belknap Press, 1991) ("We the People").

2. The successful appeal to popular sovereignty at the Founding, for example, blotted out technical irregularities otherwise required for constitutional amendment.

3. On the back jacket of *We the People* (cited in note 1), Cass Sunstein comments, "This is a truly distinguished contribution to constitutional thought, one that will reorient the field in major ways." Sanford Levinson's praise of Ackerman printed on the book jacket and elsewhere is no less flattering. See Sanford Levinson, *Accounting for Constitutional Change (Or, How Many Times Has the United States Constitution Been Amended?)* (A) <26; (B) 26; (C) >26; (D) All of the Above, 8 Const. Comm. 409 (1991); see also Judith N. Shklar, Book Review, 86 Am. Pol. Sci. Rev. 775 (1992). But see Michael J. Klarman, *Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman's Theory of Constitutional Moments*, 44 Stan. L. Rev. 759, 760 (1992) (rejecting the democratic theory that drives Ackerman's analysis); Suzanna Sherry, *The Ghost of Liberalism Past*, 105 Harv. L. Rev. 918 (1992) (arguing that Ackerman's work "fails to inspire, because it is mired in a fictional past and envisions a utopian future.").

counts, resulted in a second American revolution.<sup>4</sup> The post-1800 Republican efforts, Ackerman explains, do constitute successful “constitutional politics,” but the Republican regime neither fundamentally replaced the pre-existing principles of government, nor followed critical events of such force as the Civil War or Great Depression, and thus do not constitute a revolutionary or constitutionally significant moment. The 1800 revolution was “less sweeping” than both Reconstruction and the New Deal.<sup>5</sup> The less sweeping nature of the transformation results, Ackerman suggests, from Jefferson’s reluctance to “trumpet his role as popular tribune very loudly.”<sup>6</sup>

In Part I of this Paper, I first review the two basic postulates of Ackerman’s constitutional theory: (1) that periodic moments of regime-transformative politics occur, and (2) that super-majorities, not typical policymaking majorities, demonstrably win these struggles. For purposes of testing these postulates at any historical moment, I then propose a set of criteria. A potentially transformative moment, I maintain, could be identified by any combination of (1) a highly mobilized electorate, (2) fundamentally opposed policy views across society, or (3) judicial decisions with major policy impact. For purposes of determining whether super-majorities win these transformative struggles, the sole criterion is widespread acceptance of the new, transformative, policy.

In Part II, I review Ackerman’s interpretation of the 1800 Republican revolution and test it by applying the criteria specified in Part I, beginning with whether the Federalist-Republican conflict constitutes a transformative moment. To determine whether there were fundamental policy conflicts, I examine three controversies: the Alien and Sedition Acts and opposition to the federal government, anti-commercialism and civic virtue, and the federal judicial circuit. To determine whether the electorate was mobilized, I focus on studies of partisan realignment, with due attention to the fledgling nature of party machinery in 1800. An examination of contemporary judicial behavior implicates a review of *Marbury v. Madison* and other cases in their political context. The application of these first criteria leads me to the conclusion that Jefferson’s campaign constitutes a moment of potentially transformative politics.

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4. See e.g., Bernard Bailyn, et al., *The Great Republic, A History of the American People* (D.C. Heath and Co., 1977); Daniel Sisson, *The American Revolution of 1800* (Alfred A. Knopf, 1974).

5. *We the People* at 196 (cited in note 1).

6. *Id.* at 73.

Part III applies the criterion for determining whether a super-majority wins the struggle. The establishment of a legitimized party system, retrenchment of commercialism, a new naturalization act, and reform of the federal judiciary support the conclusion that transformative policy was implemented successfully. But some transformative policies survived only a short while, and Republicans would ultimately revive selected Federalist programs. The party system endured as a manifestation of legitimate opposition, but the system's creation was meant to be temporary. Major ideological contours of the regime, however, endured until 1828, and the significance that Jeffersonians ascribed to the national election of 1800 for presidential authority would give rise to the Twelfth Amendment in 1804. Part III concludes that Ackerman's account of the 1800 revolution is appropriate, but also suggests that his theory may be limited to explaining only intended constitutional change, for the advent of political parties cannot be accommodated squarely by the theory.

### I. DUALIST CONSTITUTIONAL THEORY AND AN EMPIRICAL TEST

Dualist constitutional theory may be reduced to two major postulates: (1) that periodic moments of regime-transformative politics occur, and (2) that super-majorities, not typical policymaking majorities, demonstrably win these struggles. The first postulate rests largely on a distinction that Ackerman finds advanced in *The Federalist Papers* between the normal institutions of representative government and "the people themselves," which are authoritatively superior to the former but only rarely present.<sup>7</sup> In support of the distinction, Ackerman also cites

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7. A key paper for Ackerman is No. 40, where Publius (in this case Madison) defends the Convention against the claim that it deviated from its charge of modifying the Article of Confederation. Publius maintains that the Convention is making an appeal to "the people themselves," who trump the formalism of text:

Let us view the ground on which the Convention stood. . . . They must have reflected that in all great changes of established governments, forms ought to give way to substance; that a rigid adherence [to forms] would render . . . nugatory the transcendent and precious rights of the people to "abolish or alter their governments . . .," since it is impossible for the people spontaneously and universally to move in concert . . . ; it is therefore essential that such changes be instituted by some *informal* and *unauthorized propositions*, made by some patriotic and respectable . . . citizens . . . . [Indeed the Convention] must have recollected that it was by this irregular and assumed [method] that the States were first united against the danger with which they were threatened by their ancient government; . . . . They must have borne in mind that as the plan to be framed and proposed was to be submitted to *the people themselves*, the disapprobation of this supreme authority would destroy it forever; its approbation blot out antecedent errors and irregularities.

Gordon Wood's account of "conventions" as manifestations of "the people themselves" occasionally arising in order to transcend normal political institutions and fashion public policy truly responsive to the interests of the people.<sup>8</sup> These rare moments of government by the people themselves illuminate the regime-transformative politics element of the theory. Moments of "constitutional politics," as Ackerman calls them, refer to a "series of political movements that have . . . called upon their fellow Americans to engage in acts of citizenship that, when successful, culminate[ ] in the proclamation of higher law in the name of We the People."<sup>9</sup> In focusing on the New Deal and Reconstruction eras as successful constitutional politics,<sup>10</sup> Ackerman suggests that regime-transformation implies major change in basic governmental structure or the political principles around which society is organized. Mere shifts in means—Keynesian versus monetarist monetary policy, for example—probably do not qualify.

The second major theme of Ackerman's theory is rooted in his position that "the people themselves" may speak through the formalism of Article V or the informalism of its "convention" provisions. The legislative majorities required under Article V are super-majorities. Ackerman understands the respect for convention politics under Article V to stand as historically informed recognition that "the people themselves" hold ultimate constitutional discretion.

Reduced to its two basic postulates, Ackerman's theory lends itself to empirical testing. A set of criteria may be formulated for whether the conditions required by each postulate obtain during the moment under investigation.

1. *A transformative political moment.* A moment would be considered transformative only if pre-existing governing principles or structures fundamentally change. Thus, a necessary condition of constitutional politics is *potentially transformative change in public policy*. Transformative rhetoric should be included in this category, because any fundamental change usually will be preceded by calls for such change. This criterion requires examining the nature of policy proposals. The concept of constitutional politics also rests on the quasi-empirical assumption that

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*We the People* at 173-74 (cited in note 1) (quoting *The Federalist*, No. 40 (James Madison)).

8. Gordon S. Wood, *The Creation of the American Republic 1776-1787* at 306-343 (U. of N. Carolina Press, 1969).

9. *We The People* at 7 (cited in note 1).

10. See *id.* at 58-130.

“the people themselves” are present,<sup>11</sup> suggesting that the electorate would be highly mobilized, producing high voter turnout and possibly a shift in partisanship across the electorate.

Judicial behavior deserves consideration because of the Court’s guardian relationship to constitutional law. The exercise of judicial review following or during moments of electoral upheaval likely suggests that policies favored by new legislative majorities depart from pre-existing, paradigmatic higher law. Thus judicial review may be a strong indicator of transformative politics. The Court, however, also might interpret the Constitution so as to initiate transformative political change and do so without concomitant electoral upheaval.<sup>12</sup> Such policymaking would, in effect, constitute a form of transformative politics and require attention to how the electoral and political forces respond.

2. *Super-majorities win.* At one level, the method for determining whether the super-majoritarian interest wins seems simple: first, locate what the super-majoritarian interest is, and second, following the transformative moment, determine whether that interest has been translated into law or public policy. Determining the super-majoritarian interest, however, may not be as easy as reading the signs and placards carried by the visible members of interest groups. And even if the criteria for transformative moments help to specify these interests, the mere translation of them into public policy may not constitute a victory. If the changes endure only a short while, was the moment genuinely transformative or ultimately static? The super-majoritarian feature of dualist theory would, it seems, require the transformative change to be demonstrably attributable to super-majoritarian will. Thus, the best criterion here seems the extent to which the changes reach mainstream status.<sup>13</sup> The absence of challenge will be viewed as tacit approval, simply on the ground that patterns and practices that go relatively unchallenged are considered legitimate.

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11. See *supra* notes 7-9 and accompanying text.

12. The Warren Court’s *Brown v. Board of Education* decision and its subsequent impact on race policy arguably constitute a fundamental change in governing principle not generated by electoral upheaval. Ackerman recognizes this, noting that the problem with *Brown* (and *Griswold*) is the top-down prophesying by the Court. See *We the People* at 139-40 (cited in note 1). He finds, nevertheless, that Chief Justice Warren’s opinion in *Brown* represents an effort to synthesize disparate elements of the three governing regimes in American constitutional history. *Id.* at 142-50.

13. In his discussion of how to assess the implementation of public policy, William Clune also relies on this criterion. See William H. Clune III, *A Political Model of Implementation and the Implications of the Model for Public Policy, Research, and the Changing Roles of Law and Lawyers*, 69 *Iowa L. Rev.* 47, 91 (1983).

## II. APPLYING THE TEST TO THE REVOLUTION 1800: WAS THERE TRANSFORMATIVE POTENTIAL<sup>14</sup>

### A. FUNDAMENTAL POLICY CONFLICT AND RHETORIC

Over the course of the 1790s, the Federalist and Republican parties opposed each other on several fundamental issues: type of political economy, foreign policy and the nature of the American state, political organization and the public voice, and the legitimacy of opposition.

1. *Political economy and the threat to civic virtue.* Throughout the 1790s, the Federalists sought to implement Hamilton's

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14. For those readers not familiar with the major events of the 1790s up to 1800, the following summary might help. The differences between the Federalists and the Republicans were rooted in the division between the Federalists and Anti-Federalists. The former sought a larger central government more capable of securing commercial interests. The latter sought better but less powerful national government and favored an agrarian political economy, largely because of its promise for securing civic virtue. Madison, Hamilton and Jefferson had been Federalists during the Constitutional Founding period, but Hamilton's economic program and the French Revolution would revive debates about political economy and central authority and divide some former allies into Federalist and Republican camps.

In four reports to Congress, Hamilton, as Secretary of the Treasury, detailed his economic plans for the country. In short, he sought: revolutionary war debt consolidation by the central government, with securities issued to finance it; a national bank; duties and taxes as a means of making payments on the debt; and industrialization. Through groups and friends in the various states, Hamilton and the Federalists also sought more allegiance to the national government as a means of promoting their interests. They also favored a bigger standing army. Opponents often viewed commercialism as suspect and began to view the Federalists as nearly as monarchical as the Crown had been.

As the French Revolution widened into the French-British war in the early 1790s, the Federalists and Republicans supported the side which better served their interests. The French principles emulated by Republicans, according to Federalists, would destroy American society, if so transplanted. When the Federalists, aiming to avoid renewed war with Britain, negotiated the Jay Treaty, which essentially revitalized British rule of 1756, opponents charged that the Federalists were compromising the nation's security. French efforts to bribe American diplomats served as fodder for the Federalists. Near the close of the decade, a "quasi-war" at sea between the Americans and French had begun.

Republicans organized their opposition to Federalist programs by mobilizing the polity and press, with Jefferson becoming the ideological leader. Economic depression and the quasi-war with France had led the Federalists to enact some repressive measures, the most notable of which were the Alien and Sedition Acts. The Acts were purportedly to preserve national security. In the eyes of Republicans, however, the acts were Federalist maneuvers to eliminate opposition. The Republicans responded by drafting the Virginia and Kentucky Resolutions, which maintained that States could decide the constitutionality of federal legislation and interpose themselves between the citizenry and the central government.

John Adams' negotiated settlement of the quasi-war angered some Federalists, splitting the party's support; and in 1800, the Republicans won the Presidency and Vice-Presidency. Jefferson and fellow Republican Aaron Burr tied in the number of electoral votes garnered, so the election actually was resolved in the House of Representatives, which eventually selected Jefferson as president. The Federalists left office peaceably in 1801, but Adams staffed the federal judiciary with Federalist judges prior to his departure.

vision of commercialism by establishing a national bank, issuing securities on a centrally consolidated national debt, and levying taxes and duties for government-sponsored internal improvements.<sup>15</sup> In 1793, in direct response to Hamilton's program, Jefferson outlined a Republican agenda. It included abolition of the national bank, reduction of the impost tax, repeal of the excise tax, and exclusion of public debt-holders from Congress.<sup>16</sup> Over the course of the decade, Jefferson emerged as the political leader of the Republican party.<sup>17</sup> Activist contributors to newspapers and political pamphleteers also developed the Republican agenda and communicated it to the public, often citing the dangers to the farmer and civic virtue posed by commercialism.<sup>18</sup> The 1800 Republican party platform, as printed in the Philadelphia *Aurora*, promised voters: Decrease of Public Debt, Reduced

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15. Conflict over Alexander Hamilton's economic vision for the country antedated the ratification of the Constitution. Thus the same basic economic program that Hamilton advanced in 1790 and 1791, as Joseph Charles suggests, would hardly seem adequate cause for the ensuing strife between Federalists and Republicans. See Joseph Charles, *The Origins of the American Party System* 97 (Institute of Early American History and Culture, 1956). The resulting acrimony may be best explained by what Lance Banning describes as the suffused hypersensitivity to State encroachment on liberty, informed by Revolutionary maxims. See Lance Banning, *The Jeffersonian Persuasion* 127 (Cornell U. Press, 1978).

16. Banning, *The Jeffersonian Persuasion* at 181 (cited in note 15).

17. Jefferson's predilection for agrarian interests had been public knowledge since his *Notes on the State of Virginia*, where he commented that "those who labor in the earth are the chosen people of God." See Noble E. Cunningham, Jr., *The Jeffersonian Republicans* 220-21 (U. of N. Carolina Press, 1957) (The comment may be found in Thomas Jefferson, *Notes on the State of Virginia* 164-65 (William Peden, ed., W.W. Norton & Co., 1954)). When Jefferson's criticism of the Hamilton's economic program was printed without his knowledge or approval, a Federalist propaganda campaign followed. A series of political essays penned by "Publicola," who was actually John Quincy Adams, defended Federalist policies. Federalists positions were also advanced in *Discourses on Davila*. Madison and Jefferson responded to the campaign by helping to establish a national newspaper that would print articles opposing printed Federalist positions—the *National Gazette*. Between 1791 and 1793, the *Gazette* would serve as a forum for developing a cohesive Republican party ideology. See Banning, *The Jeffersonian Persuasion* at 155-60, 182-94 (cited in note 15); see also Cunningham, at 10-15 *supra*.

18. Political pamphlets were also a means of Republican political expression. George Logan, who had contributed to the *Gazette* under the pen name "An American Farmer," published pamphlets attacking programs that threatened to depress the agricultural population and attributed the economic woes of the country to those citizens "infatuated with the false principles of the government of Great Britain." See Banning, *The Jeffersonian Persuasion* at 186-92 (cited in note 15). This association of the Federalists with Britain became more important, indeed politically divisive, later in the decade. The most important pamphleteer of the decade was John Taylor, whose *An Enquiry into Principles and Tendency of Certain Public Measures* (1794) stood nearly as an unofficial statement of Republican principles. Taylor saw Federalist programs as predicated in misinterpretation of the Constitution and favored strict construction of the text. He also maintained that since government depends on the people for its life, it must always seek the general good. The National Bank, then, had to be dismantled, as it served to make the rich richer and the poor poorer. See *id.* at 192-200.

Taxes, No Loans, No Excises, Reduced Public Salaries, and a system of economy and care of the public money.<sup>19</sup>

2. *Foreign policy and nature of the American state.* The French Revolution, as Richard Hofstadter explains, forced American leaders “to make decisions about foreign policy that were bound to have either a British or a French bias, that made the party breach unnegotiable and almost irreconcilable.”<sup>20</sup> Jay’s treaty with Britain in 1794, amid the war between Britain and France, fomented the division. Prior to the treaty, the British had announced plans to remain in Northwest territory indefinitely and also seized cargoes of American ships carrying provisions to or from French islands. Jay’s treaty stipulated that Britain would leave its Northwest posts, expand commerce with the United States, and pursue an arbitrated settlement of prewar debts and other disputes. The Americans agreed not to trade with British peacetime enemy colonies, to grant Britain most-favored-nation trading status, and to pay out of government funds many American debts to British merchants.<sup>21</sup>

The Federalists maintained that the treaty was essential for national security, since it would ameliorate tensions with Britain—a military power capable of inflicting substantial damages on the United States. In so doing, it would preserve the progress of Hamilton’s economic programs. Rejecting the treaty, they charged, would force the United States into an alliance with France and that country’s global struggles.<sup>22</sup> An alliance with France would also increase the domestic influence of French principles, and these principles, most Federalists believed, would destroy American society. As for whether the treaty limitations imposed on Congress regarding the regulation of commerce violated the Constitution, Federalists simply maintained that the Constitution assigned the president authority to make treaties with the Senate’s advice and consent.<sup>23</sup>

Republicans loathed the treaty. From their perspective, it compromised national interests by renouncing “sequestration,

19. Cunningham, *The Jeffersonian Republicans* at 214 (cited in note 17) (reproducing the party ticket printed in the Philadelphia Aurora, October 14, 1800).

20. Richard Hofstadter, *The Idea of a Party System* 88 (U. of Calif. Press, 1969).

21. Richard Buel comments on the risks the United States took in relinquishing the possibility of sequestration, given the U.S. Britain trade imbalance: “Everyone knew that, given the balance of trade between the two nations, British debts in America would always far exceed American debts in Britain. Thus by giving up an instrument of substantial power over Britain while Britain gave up nothing, the United States risked permanent subordination.” Richard Buel, Jr., *Securing the Revolution* 63 (Cornell U. Press, 1972).

22. *Id.* at 69.

23. *Id.* at 70.

nonintercourse, and discrimination” against Britain—“the only weapons [the United States] possessed for bringing Great Britain to terms short of war.”<sup>24</sup> The treaty, Republicans charged, clearly aligned the United States with Britain against France, the greater defender of liberty. With regard to the presidential authority to negotiate the treaty, Republicans maintained that Jay’s treaty represented an unconstitutional aggrandizement of executive authority: it could ultimately lodge all congressional and judicial power in the hands of the president and Senate. As Richard Buel comments, Republicans saw the exercise of presidential power represented in Jay’s treaty as “an argument for aristocracy and monarchy.”<sup>25</sup> In 1799, Jefferson noted his opposition to “monarchising” features of the Constitution.<sup>26</sup>

3. *Political organization and public opinion.* The framers of the Constitution generally denounced political parties as divisive forces that would threaten the fabric of the republic. Richard Hofstadter observes that “[t]he idea of a legitimate opposition—recognized opposition, organized and free enough in its activities to be able to displace an existing government by peaceful means—is an immensely sophisticated idea” that the Framers of the Constitution had neither developed nor imagined at the republic’s inception.<sup>27</sup> But party organization began with the rise of opposition to Hamilton’s economic program announced in 1790, whereupon Federalists responded by building coalitions of support. Over time, party organization moved from Congress to state machinery, and, as party conflict evolved, Cunningham observes, “warnings against the dangers and evils of parties grew louder and were heard more often.”<sup>28</sup>

Both Republicans and Federalists acknowledged the political vice usually associated with parties, so that neither tended to view their party machinery as a permanent addendum to the American political process. Republicans understood their party machinery as essential to preservation of the Union; once the crisis ended, the machinery would dissolve. The Federalists were more vociferous in denouncing political parties, urging instead common support of the government.<sup>29</sup> But they nurtured their

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24. *Id.* at 63.

25. *Id.* at 70.

26. Cunningham, *The Jeffersonian Republicans* at 211 (cited in note 17) (quoting Jefferson to Elbridge Gerry, January 26, 1799, Paul Leicester Ford, ed., *The Writings of Thomas Jefferson* 327-29 (G.P. Putnam’s Sons, 1892-99)).

27. Hofstadter, *The Idea of a Party System* at 8 (cited in note 20).

28. Cunningham, *The Jeffersonian Republicans* at 140 (cited in note 17).

29. *Id.* at 141 (noting that many sermons in New England addressed the evils of

own party organizations so as to compete with Republican political forces. By 1796, candidates for public office were running on party tickets, and some states were using party organizations to nominate candidates. By 1800, party committees at the local level had become means of informing and mobilizing voters.

As the 1800 election approached, the Republicans implemented an unprecedented programmatic effort to mobilize the public through party machinery and elevate the significance of national elections for the presidency. They sought not only to improve their party machinery across all states, but also to reform laws regarding the choice of presidential electors, so as to favor Republicans.<sup>30</sup> Initially, Federalists denounced partisan attempts to control the selection of presidential electors, but ultimately they too encouraged biased reform in elector selection laws.<sup>31</sup>

4. *Legitimate opposition.* Following the French seizures of American ships in response to the Jay Treaty, the Federalists secured passage of the Alien and Sedition Acts.<sup>32</sup> The Alien Act authorized the president to expel, imprison, or fine dangerous aliens, contingent upon declaration of war. The Sedition Act criminalized any organization, conspiracy, or open criticism of the government or any of its agents, and could apply to domestic political opposition in times of peace.

The Federalists maintained that the Acts were essential for national security. John Marshall, one of the most eloquent Federalist spokesmen, defended the Acts in a 1798 address. Under the Constitution, he observed, Congress has the authority to define and punish offenses against the law of nations, and “it is an offence against that law [of nations] to become dangerous to the peace and safety or to be concerned in any treasonable or secret

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parties and that the “political parsons” delivering the sermons often had Republicans in mind).

30. *Id.* at 144-47.

31. *Id.*

32. A brief history of the Acts might help. The French had responded to the Jay Treaty by seizing American ships, just as the British had done prior to the Treaty. Diplomatic efforts failed to resolve the conflicts and led to limited hostilities between French and American forces. The Republicans were outraged at the hostilities, but their call for a review of the failed diplomatic proceedings led to revelation of the embarrassing XYZ affair, in which French diplomats requested a loan, a bribe and an apology (for remarks made by Adams) from U.S. diplomats. The Republicans maintained that the disclosure was yet another attempt by the Federalists to malign France and destroy support for the principles of liberty enshrined by the French republic. But the ongoing hostilities and the XYZ affair led public opinion to turn against France. The Federalists then began a limited naval war with the French, which would last two years. During the patriotic fervor of this moment, the Federalists managed to enact the Alien and Sedition Acts.

machinations against the government of the country in which he resides.”<sup>33</sup> Marshall interpreted both Congress’ power to suppress rebellions and the guarantee to each state of a republican form of government under the Constitution to imply an affirmative duty on the central government of protecting states from invasion, with congressional access to any necessary means for executing the duty. Removing dangerous aliens, he maintained, is a legitimate method of satisfying that duty.<sup>34</sup> The principle could be abused, “but the possibility of abusing a principle is never supposed to be a correct argument against its use.”<sup>35</sup> The attacks on the sedition law, moreover, were unwarranted, because to deny government the power to punish “false, scandalous and malicious” writings “would be to assert the inability of our nation to preserve its own peace, and to protect themselves from the attempt of wicked citizens . . . incessantly employed in devising means to disturb the public peace.” The Constitution forbids all abridgement of the freedom of the press, but it is nevertheless necessary to inquire whether an act in question “does in fact *abridge* the freedom of the press . . . A punishment of . . . licentiousness is not considered as a restriction of the freedom of the press.”<sup>36</sup>

The Republicans argued that the Acts, particularly the sedition law, were oppressive measures, inconsistent with fundamental liberties of criminal procedure and free expression guaranteed under the Constitution. Under the sedition law, a person might be convicted by a jury for merely having an opinion, unless he could persuade the jury his opinion was true. The sedition law would not only intimidate critics of the government and those who would print criticisms, but, as Madison charged, make elections meaningless. The law would insulate incumbents from opponents’ criticisms, so that voters “will be compelled to make their election between competitors whose pretensions they are not permitted by the act equally to examine, to discuss, and to ascertain.”<sup>37</sup>

Jefferson and Madison, respectively, wrote the Republican opposition ideology into the resolutions issued by the Kentucky

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33. J. Marshall, *Address on Constitutionality of Alien and Sedition Laws*, in M. Frisch and R. Stevens, eds., *The Political Thought of American Statesmen* 106 (F.E. Peacock Publishers, 1973).

34. *Id.* at 107.

35. *Id.* at 108.

36. *Id.* at 113.

37. Buel, *Securing the Revolution* at 250 (cited in note 21) (quoting James Madison’s “Report of the Committee,” from Gaillard Hunt, ed., 6 *The Writings of James Madison* 397-98 (Knickerbocker Press, 1906)).

and Virginia legislatures in response to the Alien and Sedition Acts. Madison advanced the doctrine of interposition—that the states could judge the constitutionality of federal acts and interpose themselves between their citizens and illegitimate actions by the central government. He admonished that liberal construction of the Constitution would serve to increase centralized authority, thereby increasing the tendency toward monarchy. He also maintained that the sedition law abridged the First Amendment guarantee of free expression of ideas, the very principle essential to the survival of free society.<sup>38</sup> Jefferson emphasized the authority reserved to the States and the people themselves under the Constitution. “[E]very State has a natural right in cases not within the compact, . . . to nullify of their own authority all assumptions of power by others within their limits: that without this right, they would be under the dominion, absolute and unlimited, of whosoever might exercise this right of judgment for them.”<sup>39</sup>

#### B. ELECTORAL MOBILIZATION

Partisan realignments, as Walter Dean Burnham explains, are shifts in partisanship across the electorate that “arise from emergent tensions in society which, not adequately controlled by the organization or outputs of party politics as usual, escalate to a flash point.” “They are,” he continues, “issue-oriented phenomena, centrally associated with these tensions and more or less leading to resolution adjustments . . . [and] transformations in the general shape of policy.”<sup>40</sup> Thus the concept suggests that major shifts in partisanship surrounding the 1800 election reveal an electoral upheaval leading to major policy changes.

The concept’s application to the Federalist-Republican conflict is, however, strained by its presumption of a party system thoroughly infused in electoral politics. The theory supposes that realigned partisanship corresponds to “transformation in the shape of . . . the voting universe,”<sup>41</sup> but the 1790s party system arose as an instrument of the political elite. The system had also just begun to organize. Its geographical scope was limited and its purpose seen as temporary. The opposing parties did, nevertheless, distinguish candidates along policy lines and effectively mo-

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38. Sisson, *The American Revolution of 1800* at 336 (cited in note 4).

39. Thomas Jefferson, *Draft of the Kentucky Resolutions*, in *American Statesmen* at 17 (cited in note 33).

40. Walter Dean Burnham, *Critical Elections and the Mainsprings of American Politics* 10 (W.W. Norton & Co., 1970).

41. *Id.* at 12

bilize the electorate during the 1790s and the 1800 campaign. A cautious application of the realignment thesis thus seems warranted.

Party identification began with Hamilton's economic proposals in the early 1790s. In the presidential election of 1796, after Republican opposition ideology had developed, Jefferson came within three electoral votes of winning the presidency. (See Table I) Following the XYZ affair,<sup>42</sup> which embarrassed

TABLE I\*

Year	Presidential Electors	House Members	Senate Members	Fed. Rep.	Fed. Rep.	Fed. Rep.
1792	77 <sup>a</sup>	55 <sup>a</sup>	54	52	17	13
1794			48	57	19	13
1796	71	68	58	48	20	12
1798			63	43	19	13
1800	65	73	41	65	14	18
1802			39	102	9	25
1804	14	162	25	116	7	27
1806			24	118	6	28
1808	47	122	48	94	6	28
1810			36	108	6	30
1812	<sup>b</sup>	128	68	112	9	27
1814			65	117	11	25
1816	34	183	42	141	10	32
1818			27 <sup>c</sup>	156	7 <sup>c</sup>	35

\* Adapted from William Nisbet Chambers, *Political Parties in a New Nation* 182 (Oxford U. Press, 1963), which relies on data from Bureau of the Census, *Historical Statistics of the United States, Colonial Times to 1957* (1960), corrected by later data, where available.

<sup>b</sup> The fusion of DeWitt Clinton Republican faction and Federalists: 89

<sup>c</sup> Local remnants of national party, "nominally Federalists."

Republicans, Federalists scored big gains in the 1798-1799 congressional elections, especially in the South. These gains resulted in invigorated Republican efforts as they looked ahead to the 1800 election. Internal division among the Federalist leaders broke their ranks, and the 1800 election ushered Jefferson into the presidency. Adams won several states, but the Federalists suffered a major loss in the congressional elections. The Federalist party endured past 1800, exhibiting some force until its ill-fated Hartford Convention attack on Madison's handling of the War of 1812. By 1820, the party could not nominate a candidate. The Republican party, in contrast, endured and successfully implemented much of its political program.<sup>43</sup> Table I shows the de-

42. See *supra* note 32.

43. See Bailyn, *Great Republic* at 386-87 (cited in note 4).

cline of support for Federalist presidential and congressional candidates, relative to Republican increases.

### C. JUDICIAL REVIEW/JUDICIAL POLICYMAKING

The Federalists staffed the first Supreme Court with Federalists, and early Court decisions reflected partisan leanings and gave rise to livid Republican criticism. In 1796, in *Ware v. Hylton*,<sup>44</sup> the Court declared invalid a Virginia statute sequestering pre-Revolutionary War debts of British creditors. The peace treaty between the Americans and British stipulated no impediments on the recovery by British subjects of debts due them by Americans. The Court held that the treaty nullified earlier Virginia law, destroyed payments made under it, revived the debt, and gave rights of recovery against the debtor, notwithstanding payment made under the authority of state law. The Court's subordination of state law to treaties with respect to the very sensitive issue of Revolutionary debts "led to Republican criticism of the judges as Pro-British Federalists."<sup>45</sup>

*Chisholm v. Georgia*,<sup>46</sup> decided in 1793, involved the question whether the federal judiciary may summon a state as defendant and adjudicate its rights or liabilities. Despite assurances in *The Federalist Papers* that such jurisdiction would be unavailable to federal courts, the Supreme Court held that federal courts do possess such authority. The decision resulted in a Republican-led "states' rights" backlash and the proposed Eleventh Amendment, which limited federal jurisdiction in cases of suits against states. The Federalists ultimately conceded the Eleventh Amendment in 1798, amid "the rising Republican clamor . . . for a new constitutional convention . . . ."<sup>47</sup> The Eleventh Amendment notwithstanding, *Chisholm* did represent the Federalist vision of consolidating power under a central government.

Common law also became a divisive political issue in the 1790s. In short, the question was whether federal common law jurisdiction existed. The issue had been raised in *United States v. Worrall*,<sup>48</sup> where the losing defense attorney, a Republican, had maintained that the criminal common law charge against his client contravened the limitations on federal power represented in

44. 3 U.S. (3 Dall.) 199 (1796).

45. Alfred H. Kelly et al., *The American Constitution: Its Origins and Development* 166 (W.W. Norton & Co., 6th ed. 1983) ("*The American Constitution*").

46. 2 U.S. (2 Dall.) 419 (1793).

47. See Calvin R. Massey, *State Sovereignty and the Tenth and Eleventh Amendments*, 56 U. Chi. L. Rev. 61, 113 (1989).

48. 2 U.S. (2 Dall.) 384 (1798).

the Tenth Amendment. But during the foreign policy crisis of 1798, the Federalists sought to prosecute seditious libel in federal courts under the common law, and their success led to passage of the Judiciary Act of 1801, which extended the jurisdiction of federal courts to all cases in law and equity arising under the U.S. Constitution and federal law.

The Sedition Act would soon provide the statutory basis for sedition prosecution, but until then, the sweeping jurisdiction granted the federal courts under the Judiciary Act alerted Republicans to the possibility that a national common law might be presumed by the Federalists. Common law reached virtually every area of life, so to assume a *national* common law, Republicans charged, would mean granting to Congress general legislative power, a violation of the limited national power guaranteed by the Constitution. In 1800 Jefferson commented: "If the principle were to prevail of a common law being in force in the U.S., [it would] possess the general government at once of all the powers of the state governments and reduce [the country] to a single consolidated government."<sup>49</sup>

### III. DID A SUPER-MAJORITY WIN THE STRUGGLE?

The inquiry now turns to whether widespread acceptance of Republican ideology and programs followed the party's rise to power. "Widespread acceptance" is tested by looking to the long-term status of policies and principles and any indicators that the relevant policies and principles gained, for at least an historical moment, strong public support.

1. *Political economy: a retrenchment of commercialism.* Jefferson quickly sought to retrench the economic program on which the Federalists had embarked. In the first session of Congress after his election, Jefferson considered abolishing the whole system of internal taxation the Federalists had adopted. Fearing the effects of such a sudden cutoff in revenues, the plan implemented was not so ambitious, but was enough that governmental cutbacks were required. Indeed, upon retrenchment, one half of federal administrative offices were abolished, with many cutbacks in the military.<sup>50</sup>

Retrenchment, however, was not complete. The Republicans spared the national bank—the institution previously incommensurable with the Republican vision of political economy.

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49. *The American Constitution* at 171 (cited in note 45) (quoting Jefferson, no cite provided).

50. *Id.* at 23.

Jefferson maintained that since it had already been established, he could not in good faith abolish it.<sup>51</sup> Madison, in fact, came to support the bank. The War of 1812 required the development of manufacturing war material, and this further distorted the agrarian vision of political economy.<sup>52</sup> The Louisiana Purchase would greatly raise the public debt, but it had fallen before and would eventually fall again—dramatically so.<sup>53</sup> Following the 1812 war, sectional differences over matters of economic development, such as tariffs and internal improvements, fundamentally divided Republicans and served to erode their “common good” ideology.<sup>54</sup> Those partisans carrying the Republican banners of 1798 and 1800 became known as the “old Republicans.” “New Republicans,” Leonard White explains, included a former staunch Federalist, John Quincy Adams, and were “nationalist in outlook . . . . They stood for the broad construction of national power, for an active employment of those powers, for a strong navy, for a well-organized army, for a United States Bank, for a tariff, for internal improvements, and for a foreign policy that looked toward the further acquisition of territory.”<sup>55</sup> These new Republicans were a policy force, but, as Richard Ellis notes, they were less successful in establishing a federal program of improvements than old Republicans, many of whom had voted for the bank on the belief that it was the only means of securing economic stability following the 1812 war and proliferation of banks.<sup>56</sup> Even so, in 1828 the new-Republican Secretary of Treasury cited Alexander Hamilton as authority for economic policy.<sup>57</sup>

2. *Legitimate opposition.* Given the popular and intellectual disdain for political parties, both the Republicans and Federalists had conceived their party machinery as more aberrations necessary for the preservation of the Union. But party organizations endured beyond the rise of the Republicans in 1800. Shortly after the election, in fact, the party system began to make institutional changes in American politics. First, it marked the triumph of parties over politicians. Before the advent of parties, candidates in elections were judged according to character, personal-

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51. Russell L. Hanson, *The Democratic Imagination in America* 103-04 (Princeton U. Press, 1985).

52. *Id.* at 105.

53. Banning, *The Jeffersonian Persuasion* at 279 (cited in note 15).

54. Hanson, *Democratic Imagination* at 106-07 (cited in note 51).

55. Leonard D. White, *The Jeffersonians* 14 (Macmillan Co., 1951).

56. Richard E. Ellis, *The Persistence of Antifederalism after 1789*, in Richard Beeman et al., eds., *Beyond Confederation* 295 (U. of N. Carolina Press, 1987).

57. White, *The Jeffersonians* at 14 (cited in note 55).

ity, qualifications or integrity. With party affiliation becoming a more relevant consideration, the stigma attached to campaigning for office declined; the effort could be viewed as a contribution to the party cause. Indeed, by 1800, as Cunningham observes, it was a political asset to have the reputation of being a party man.<sup>58</sup> Party affiliation revealed to voters a candidate's policy preferences and perhaps even his moral character, both of which were important electoral considerations. In the next two decades, civic virtue—a primary tenet of Republicanism—became identified with party regularity.<sup>59</sup>

Second, as James Ceasar observes, enduring party machinery led to a transformation of the presidential selection system. Republicans introduced and, by their actions, “helped to legitimize the idea of the candidate as a party leader.”<sup>60</sup> They demonstrated that victory in national elections could supply energy for the president. They also implemented changes in electoral institutions, including the congressional caucus for purposes of candidate nominations and the Twelfth Amendment, which allowed the separation of electoral votes for president and vice-president.<sup>61</sup>

It also is important to note that the foreign-born, who were direct targets of the Alien and Sedition laws, faced different governmental policy following the Republican victory. First, the Alien and Sedition laws had expired and were not renewed. Second, the Republicans, in the first session of Congress after the election, passed a new naturalization act, restoring the requirements under Washington's administration. “Five years' residence would once more suffice to make the foreign-born an American citizen, with three years' notice of intention.”<sup>62</sup>

3. *Weakening the central government.* Gordon Wood comments that during the first three decades of the 1800s, particularly after Jefferson left the presidency, “the United States was weaker than at any other time in its national history.”<sup>63</sup> Jefferson sought to weaken the central government by retrenching the Hamiltonian economic program, dismantling the federal judicial

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58. Cunningham, *The Jeffersonian Republicans* at 254 (cited in note 17).

59. *Id.* at 254-55.; see also Hanson, *Democratic Imagination* at 118-19 (cited in note 51).

60. James W. Ceasar, *Presidential Selection: Theory and Development* 96 (Princeton U. Press, 1979).

61. *Id.*

62. James Schouler, 2 *History of the United States of America: Under the Constitution* 27 (Dodd, Mead & Co., rev. ed. 1970).

63. Bailyn, et al., *The Great Republic* at 280 (cited in note 4) (Wood is the author of a particular section of the book).

circuitry and encouraging strict construction of the Constitution. Economic retrenchment, as explained above, was partially achieved. With regard to the judiciary, the Republicans repealed the 1801 Judiciary Act, which had given expansive jurisdiction to federal courts. The Judiciary Act of 1789 thus was revived, and the Republicans passed another law providing for annual instead of semi-annual sessions of the Supreme Court. Jefferson's use of executive authority in making the Louisiana Purchase has been cited as an example of both the enormous power retained by the central government under the Republicans and an abandonment of the principle of strict constitutional construction.<sup>64</sup> Notwithstanding the exercise of such power, Ellis notes that the turnover of two-thirds of the House of Representatives in the 1816 election "put a halt to any further nationalist legislation."<sup>65</sup>

If Supreme Court opinions serve as a barometer of higher law, then Republican success in retrenchment of central government generally, and the power to enforce it, may be gleaned from John Marshall's opinion in *Marbury v. Madison*. Prior to the 1803 decision, the Federalists had attempted three times to challenge the constitutionality of the Republican-led repeal of the 1801 Judiciary Act (which had resulted in Federalist judges favoring governmental prosecutions under the Alien and Sedition Acts), but each effort failed. There is little doubt that Marshall's defense of judicial review in the Supreme Court reflects Federalist interests, but his refusal to issue the mandamus suggests he recognized the possibility that such an order would be ignored. As James O'Fallon observes, "*Marbury* was born out of political defeat."<sup>66</sup> It is also interesting to note that in 1804 the Republicans would seek to impeach one of the most partisan Federalist judges, Samuel Chase, who arguably influenced Marshall's analysis in *Marbury*.<sup>67</sup> Impeachment would ultimately remove John

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64. See Ellis, *Persistence of Antifederalism* at 304 (cited in note 56); see also White, *The Jeffersonians* at 32-33 (cited in note 55).

65. Ellis, *Persistence of Antifederalism* at 307 (cited in note 56).

66. James M. O'Fallon, *Marbury*, 44 *Stan. L. Rev.* 219, 259 (1992). Kelly, Harbison, and Belz take a similar position:

Though critical of the executive, Marshall refused to issue the mandamus, thus letting the administration win the battle. He recognized, moreover, a sphere of discretionary political action in which the judiciary lacked competence to judge of constitutionality or determine the meaning of the Constitution. Acquiescing to this extent in the political power that Jefferson represented, Marshall nevertheless established a limit beyond which the political branches could not go. . . . Bold as Marshall's strategy was . . . , his assertion of judicial review was thus basically defensive in nature.

Kelly et al., *The American Constitution* at 181 (cited in note 45).

67. O'Fallon, 44 *Stan. L. Rev.* at 253-54 (cited in note 66).

Pickering from the federal bench, but not Chase—a bitter disappointment for Jefferson.<sup>68</sup>

The common law question was also eventually resolved in favor of the Republicans. In *United States v. Hudson and Goodwin*,<sup>69</sup> the Supreme Court held that federal common law indictments (which here had been issued at the bequest of Republicans) were invalid because federal courts had no common law jurisdiction. The Court maintained a strict constructionist view of constitutional interpretation.<sup>70</sup> Ironically, the charge can be made that Jefferson abandoned his strict construction principle in effecting the Louisiana Purchase.<sup>71</sup> Also, it is important to recognize that the majority opinion in *Fletcher v. Peck*,<sup>72</sup> penned by Marshall, advances an interpretation of the Constitution's contract clause that can, as it did in this case, limit state power: "When . . . a law is in its nature a contract, when absolute rights have vested under that contract, a [legislative] repeal of the law cannot divest those rights."<sup>73</sup> Under Marshall and Justice Story, moreover, the Supreme Court would eventually enhance national power.<sup>74</sup>

#### IV. CONCLUSION

A successful constitutional moment, under the Ackerman framework, requires the existence of a potentially transformative political moment ultimately won by a super-majoritarian influence. On the basis of the preceding analysis, it seems evident that in the 1790s and in 1800 Jefferson and the Republicans campaigned on an ideology that, if fully implemented, would transform the political and economic terrain shaped by the Federalists in the first years of the republic. In the first decade of the American republic, the Federalists had begun commercializing the

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68. According to George Brown Tindall, Jefferson viewed the impeachment process as a "farce" after Chase's acquittal. George Brown Tindall, *America: A Narrative History*, 326 (W.W. Norton & Co., 1984) (Tindall provides no cite for Jefferson's comment).

69. 11 U.S. (7 Cranch) 32 (1812).

70. For a discussion of the extent to which *Hudson* addressed a tension between common law and the Constitution, see Gary D. Rowe, *The Sound of Silence: United States v. Hudson & Goodwin, The Jeffersonian Ascendancy, and the Abolition of Federal Common Law Crimes*, 101 *Yale L.J.* 919 (1992).

71. White, *The Jeffersonians* at 14 (cited in note 55); but see Banning, *The Jeffersonian Persuasion* at 279 (cited in note 15).

72. 10 U.S. (6 Cranch) 87 (1810).

73. *Id.* at 135.

74. See, e.g., *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816) (holding that Supreme Court has appellate jurisdiction over state courts); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) (finding congressional authority to incorporate a bank under the "necessary and proper" provision of the U.S. Const., Art I, § 8).

economy, strengthening the central government against state power, and pursuing a foreign policy favoring British interests. The Republicans extolled the civic virtues of the yeoman farmer and promised to reverse both commercialism and the encroachment of national authority over state and local governments.

Fundamental change lasting until and through the next critical period in American history may be attributed to Republican efforts following the 1800 election. In the spirit of civic virtue, the Republicans retrenched the scope of national government and repudiated much of Hamilton's economic program. Central authority was curtailed by stripping the federal judiciary of much of its jurisdiction and reshaping the circuitry. But the judiciary still managed to enhance national power. The despised national bank survived, moreover, and the "new" Republicans of the 1810s favored economic policies originally advanced by the Federalists before 1800. The 1820s, however, witnessed a revival of more traditional Republican ideology. Thus, Ackerman's conclusion that the Jeffersonian revolution produced fundamental change, but not of a sweeping nature, seems apt.<sup>75</sup>

There is, nevertheless, an important question about constitutional change raised by the Jeffersonian Revolution and unaddressed by Ackerman: whether unintended fundamental change waxes constitutional. Jefferson's method of campaigning for president changed presidential selection politics so as to effect the Twelfth Amendment in 1804, but there is no evidence that the Republicans sought such change in their campaign against the Federalists. Also, despite both Republican and Federalist disdain for political parties, party machinery survived the 1800 revolution and, of course, evolved into the sophisticated system integral to the political process in the United States today. The infusion of parties into the infrastructure of American politics probably gives them tacit constitutional force, but Ackerman's theory offers little direct interpretive insight. The 1800 revolution thus may reveal that constitutional politics occasionally result in changes not originally part of a movement's transformative agenda. Ackerman's depiction of constitutional moments as deliberations by "the People" therefore may, in some instances, mistakenly presuppose a controlling consciousness in the process of constitutional development.

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75. See *supra* text accompanying notes 5-6.